The Agriculturalist Lawyer

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Note From the Chair

By Allen H. Olson, Section Chair
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Please put Sept. 21 on your calendar for the Second Annual Agricultural Law CLE to be held this year in Macon. Under the leadership of CLE Chair Nowell Berreth, this year's program should be bigger and better than ever. Program details will be forthcoming in future newsletters and ICLE announcements. Please contact Nowell at nberreth@alston.com with any suggestions concerning topics and speakers.

This issue of *The Agriculturalist Lawyer* continues to expand the publication's coverage with the addition of a "News, Notes, and Cases" section containing short blurbs about recent cases, statutes, regulations, and other items of interest to agricultural lawyers and their clients. Please send me anything of this nature that you would like printed in future issues. Agricultural law is a broad field, and this newsletter should reflect the diversity of section members' interests.

This issue also contains an article by executive committee member Matt Matilla on a recent EPA rule addressing pesticide application and NPDES permitting. Matt can be reached for additional information on this topic at mmatilla@pogolaw.com. Many thanks to Matt for putting this excellent piece together. Again, I encourage all section members to submit articles for publication on any agricultural law topics that interest them.

The American Agricultural Law Association (AALA) is sending complimentary issues of its *Agricultural Law Update* to all section members. If you find this publication as interesting as I do, I strongly encourage you to join the AALA so that you can continue to receive the *Update* and participate in other AALA activities. They will hold their 2007 conference in San Diego, Calif., on Oct. 19-20. Last year's conference in Savannah was excellent.

Finally, this issue will continue the practice begun in December of providing links to selected articles published by the National Agricultural Law Center at the University of Arkansas Law School. This issue's articles are the *Farmers' Guide to GMOs* by David R. Moeller and Michael Sligh and *Developments in Administrative Law and Regulatory Practice, 2005-2006—Agriculture* by Harrison M. Pittman, co-director of the Center.

National Agricultural Law Center Articles

The following articles are provided with the permission of the National Agricultural Law Center at the University of Arkansas School of Law (www.NationalAgLawCenter.org). The section highly recommends the Center as an excellent source of agricultural law research and information.

1. *Farmers' Guide to GMOs*, by David R. Moeller, Farmers' Legal Action Group, Inc., and Michael Sligh, Rural Advancement Foundation International - USA, January, 2005 (originally published by the Farmers' Legal Action Group, Inc.): www.nationalaglawcenter.org/assets/articles/moeller_gmos.pdf

Genetically modified crops are grown extensively in the United States but often shunned in other parts of the world. U.S. farmers who grow GMOs face unique legal issues as can farmers whose non-GMO crops are contaminated by GMOs from their neighbors' fields. This article explores these issues and makes recommendations on how farmers can protect themselves from legal risks.

2. *Developments in Administrative Law and Regulatory Practice, 2005-2006—Agriculture*, by Harrison M. Pittman, November 2006: www.nationalaglawcenter.org/assets/articles/pittman_aba-adminlaw.pdf

This article analyzes new judicial decisions, administrative actions and legislation in the area of federal agricultural administrative law.

Should any section member not have convenient internet access, please contact me at 229-888-3338, and I would be glad to send you a hard copy of either article or both. ♦

News, Notes and Cases

Federal Regulations

1. Notice 2006-108, 2006-51 I.R.B. (12/18/2006): This IRS Internal Revenue Bulletin addresses the application of the Self-Employment Contributions Act (SECA) to payments made by USDA to farmers and landowners under the Conservation Reserve Program.

2. 71 Fed. Reg. 68483, EPA, 40 CFR Part 122: This final rule addresses the application of pesticides to waters of the United States in compliance with FIFRA. See Matt Matilla's article (page 3) on same in this issue.

3. 71 Fed. Reg. 70503 (12/5/2006): USDA's Food Safety and Inspection Service (FSIS) announced the receipt of a petition from Hormel Foods to establish a definition for the voluntary claim "natural" and to delineate the conditions under which the claim can be used on the labels of meat and poultry products.

4. 71 Fed. Reg. 77266, 40 CFR Part 112 (12/26/2006): EPA has promulgated a final rule that amends the Oil Spill Prevention, Control, and Countermeasure Rule. The rule contains certain provisions governing farm storage facilities.

5. 71 Fed. Reg. 66694 (11/16/2006): The Federal Crop Insurance Corporation (FCIC) has issued proposed regulations adding crop insurance coverage for cabbage under the Common Crop Insurance Basic Provisions. The regulations would convert the cabbage pilot crop insurance program to a permanent program beginning in 2009.

Horse Protection Act

Zahnd v. Secretary of the Department of Agriculture, 2007 U.S. App. LEXIS 3752 (11th Cir., Feb. 21, 2007): The 11th Circuit upheld the decision of USDA's Judicial Officer that Lady Ebony's Ace, a four-year-old Tennessee Walking Horse, was "sore" within the meaning of the Horse Protection Act, 15 U.S.C. §§ 1821-1831, when she was entered in a horse show in Shelbyville, Tenn. As a consequence, the horse's trainer was fined $2,200 and banned from showing horses for one year.

Vidalia Onions

Bland Farms, LLC v. Georgia Dept. of Agriculture, 281 Ga. 192 (Oct. 30, 2006): The Georgia Supreme Court affirmed the decision of the trial court denying plaintiff onion growers' petition for mandamus. Plaintiffs had claimed that the Georgia Department of Agriculture was not enforcing certain rules and regulations promulgated in connection with the Vidalia Onion Act of 1986, O.C.G.A. §§ 2-14-130 *et seq*. Plaintiffs argued that the Department was required, but had failed, to prohibit certain other onion growers from adding "Certified Sweet" or "Certified Extra Sweet" trademarks to their Vidalia onion labels and advertisements. The Court held that the regulations did not specifically address this issue and that mandamus could not be used to direct the manner in which an official performed a discretionary duty.

Ag Bankruptcy-Chapter 12

In re Knudsen, 2006 Bankr. LEXIS 3179 (Bankr. N.D. Iowa, Nov. 20, 2006): This is the first reported decision interpreting provisions added to Section 1222 of the Bankruptcy Code by the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act that permit post-petition tax obligations incurred as the result of the sale of farm assets to be treated as unsecured rather than priority claims. The court held the provision was limited to assets used in the farmer's trade or business which are eligible for capital gain treatment under IRC ' 1231 and did not cover assets held for sale such as hogs or grain.

Farm Bill Debate

The current farm bill, enacted in 2002, expires at the end of year. The debate over the 2008 farm bill has already begun and is proving highly contentious. Recent articles in the *Atlanta Journal Constitution* and the *Washington Post* have alleged corruption in the administration of federal farm programs and have challenged the wisdom of paying large farmers the majority of farm program dollars. Farmers have responded by pointing out that they are "price takers" not "price makers" and that farm programs provide an important safety net that assures their survival and that the public continues to enjoy abundant food at reasonable prices. Meanwhile, increased ethanol production has driven the price of corn over $4/bu. and has created conflicts between ethanol manufacturers and the livestock and poultry feeders who are competing for the same commodity. High corn prices have in turn led to higher wheat and soybean prices as users substitute these commodities for corn. In Georgia, corn, wheat and soybeans are now bidding against cotton and peanuts for the same land. High prices are causing some to argue that this would be a good time to reduce or eliminate farm program subsidies. The ongoing WTO negotiations are also putting substantial pressure on the United States to restructure its farm programs. Others maintain that farmers will respond to the high prices by overproducing and drive the prices back down to earlier levels within two years. The debate will likely continue for much of the rest of the year with Congressional action not expected before the fall or winter. ♦

Pesticide Applications and Clean Water Act Permits:
New EPA Rule Creates Confusion

By Matthew Mattila
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On Nov. 27, 2006, the United States Environmental Protection Agency (EPA or the Agency) amended the Clean Water Act (CWA) regulations to exclude certain pesticide applications from National Pollutant Discharge Elimination System (NPDES) permitting requirements. *See* 71 Fed. Reg. 68483. Now, provided that pesticides are applied "consistent with all relevant requirements under FIFRA,"[1] an NPDES permit is not required for either:

> (i) "The application of pesticides directly to waters of the United States in order to control pests," or
>
> (ii) "The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively."

Id. at 68492. This regulation clearly makes it easier to control mosquitoes and other pests in and around the nation's waters.

EPA's new exclusion is important not only for what it says, but also for what it does not say. Nowhere does the regulation provide a permit exclusion for land-based agricultural pesticide applications. In fact, in the comments to the rule, the Agency specifically states that the regulation "is not intended to address applications of pesticides to terrestrial agricultural crops." *Id.* at 68486. Consequently, farmers and others in the agricultural sector may be left with more questions than answers.

Given the rationale behind EPA's rule, the Agency arguably could have excluded land-based agricultural pesticide applications from the NPDES permitting process.[2] EPA rationalized that the pesticides covered by the exclusion would not be considered "pollutants" under the CWA. Accordingly, there would be no "discharge of a pollutant"—a phrase broadly defined to include the addition of a pollutant to navigable waters from a point source, and the basis for requiring NPDES permits under the CWA. *See* 33 U.S.C. §§ 1311, 1342, 1362(12).

The EPA reviewed the CWA's broad definition of "pollutant" to conclude, among other things, that the pesticides covered by the exclusion would not constitute "chemical wastes" or "biological materials." Where used in accordance with FIFRA, the excluded pesticides were "product" rather than "waste" and therefore could not be a "chemical waste." *See* 71 Fed. Reg. at 68486. Similarly, such pesticides could not be "biological materials" for the purposes of becoming a "pollutant" under the CWA, in part, since courts had found biological materials to be pollutants under the CWA when dealing with "waste materials discharged from a point source." *Id.* at 68486-87.

Based on this product/waste distinction, the new rule could have expressly excluded FIFRA-compliant land-based agricultural pesticides applications from the NDPES permitting process. Instead of expanding the rule, however, EPA simply commented that it would "continue to follow its long-standing practice of not requiring NPDES permits for agricultural pesticide applications that are conducted in compliance with relevant FIFRA requirements." *Id.* at 68488. Then, the Agency cautioned that it "is continuing to consider the applicability of the CWA to situations [not covered by the rule] … where pesticides applied in accordance with relevant FIFRA requirements may reach and enter waters of the United States, including drift of pesticides applied aerially over land." *Id.* at 68488.

Because of the Agency's cautionary tone and the limited nature of the new rule, a significant question remains: Will EPA begin requiring NPDES permits for certain agricultural pesticide applications, even when the application complies with FIFRA?

The Agency certainly acknowledged that pesticides in a waste stream "including storm water" were "pollutants" under the CWA, which could result in the need for a permit. *See id.* at 68487.[3] Moreover, it appears that EPA could require permits for spray drift from aerial applications not covered by the current rule, particularly where spray drift into regulated waters is "avoidable." After all, even the current rule (addressing control of pests over and near regulated waters) requires that pesticides be "unavoidably" deposited to the water to qualify for the permit exclusion. The Agency is still studying the issue, but hopefully will provide a permit exclusion and recog-

nize that aerial spray drift from land based agricultural pesticide applications may result in pesticides being "unavoidably" deposited into regulated waters.

At this point, EPA clearly believes that pesticides applied for the purpose of controlling pests in, over and near regulated waters can be excluded from the NPDES permitting process. Because the rule does not exclude pesticide applications made to terrestrial agricultural crops, the agricultural community may question when a permit is required. Confusion will likely persist unless and until the Agency expands the current rule. However, based on the current rule and EPA's comments, those seeking NPDES permit exclusions for agricultural pesticide applications should comply with all relevant FIFRA requirements, and should avoid depositing pesticides into regulated waters to the extent possible. ♦

Matthew Mattila is an associate with the law firm of Powell Goldstein LLP in Atlanta and concentrates in environmental and toxic tort litigation. Prior to joining Powell Goldstein, Matilla served as the articles editor for the *Tulane Law Review* and received a certificate of specialization in Environmental Law from Tulane. He has previously worked in the Office of Regional Counsel and Pesticide Program Sections of the U.S. Environmental Protection Agency, Region 5, and at the Illinois Environmental Protection Agency.

Endnotes

1. FIFRA refers to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et. seq.
2. Critics of the proposed rule pointed out as much back in 2005, but EPA did not expand the final rule. See April 4, 2005 Letter from Pesticide Policy Coalition to EPA, at p.2 <http://www.pesticidepolicy.org/npdes/npdes.htm> (visited Jan. 23, 2007) (requesting rule coverage to "be broadened considerably to make it clear that an NPDES permit is not required for the label allowed application of pesticides by other users or uses….").
3. For an NPDES permit to be required, such pollutants would still need to be discharged from a "point source." The CWA specifically excludes "agricultural stormwater discharges" from the definition of a "point source." See 33 U.S.C. § 1362(14). Yet, to the extent pesticide-contaminated stormwater is captured and discharged through pipes, ditches or other "discrete conveyances" (all of which fall within the definition of "point source") an NPDES permit could be required. See *id.*